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No. 87-1071

In the Supreme Court of the United States

OCTOBER TERM, 1987

BYRON T. LIGGETT AND LORRIETA A. LIGGETT,
Plaintiffs-Appellants,

VS.

STATE FARM FIRE AND CASUALTY COMPANY,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

MOTION TO DISMISS APPEAL
or in the Alternative
TO AFFIRM JUDGMENT

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TO AFFIRM JUDGMENT

Appellee State Farm Fire and Casualty Company[1] moves the Court to dismiss this appeal on the ground

1. Appellee State Farm Fire and Casualty Company (hereinafter referred to as "State Farm") is a wholly-owned subsidiary corporation of State Farm Mutual Automobile Insurance Company. Affiliated companies include State Farm Annuity and Life Insurance Company, State Farm County Mutual Insurance Company of Texas, State Farm General Insurance Company, State Farm Life and Accident Assurance Company and State Farm Lloyds.

that this appeal is not within this Court's jurisdiction, or in the alternative, to affirm the Order and Judgment of the United States Court of Appeals for the Tenth Circuit on the ground that it is manifest that the questions on which the decision of this cause depends are so unsubstantial as not to need further argument.

STATEMENT OF THE CASE

A. Nature of the Case

This is a diversity action brought by the Liggetts in the United States District Court for the District of Kansas wherein the Liggetts sought damages from State Farm arising out of the denial by State Farm of the Liggetts' claims for insurance proceeds for a fire in a dwelling at Great Bend, Kansas and the bringing by State Farm of an action for declaratory judgment against the Liggetts in the District Court of Barton County, Kansas for a determination that the Liggetts were not entitled to recover their loss under State Farm's insurance policy. In addition to various state common law claims (i.e. malicious civil prosecution, malicious criminal prosecution and libel), the Liggetts also made claim for alleged violation of their constitutional rights. Specifically, the Liggetts claimed that the bringing by State Farm of the aforementioned declaratory judgment action violated their rights guaranteed under the Fifth Amendment that "no person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a Grand Jury. . . ."[2]

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2. The Liggetts now for the first time in connection with this appeal also invoke the Fourteenth Amendment. (*Compare* Juris. Stmt. at 6a *with* Juris. Stmt. at A-19, B-2.)

B. Course of Proceedings Below

The Liggetts commenced this action on October 21, 1985, by filing their Complaint with the district court below. Following the completion of pretrial discovery State Farm moved for summary judgment. On March 19, 1987, almost seventeen months after this action was commenced, and almost nine months after pretrial discovery had been completed, the district court (Honorable Earl E. O'Connor, Chief Judge) filed a Memorandum and Order (Juris. Stmt. at A-1 through A-43) granting State Farm's motions for summary judgment. Chief Judge O'Connor made the following rulings on the Liggetts' state common law claims:

(1) *Malicious Criminal Prosecution.*

That the Liggetts could not, as a matter of law, satisfy a crucial element of their purported claim for malicious criminal prosecution, i.e. that criminal proceedings or charges were brought against the Liggetts by the State of Kansas or its officials.

(2) *Libel.*

With respect to allegedly libelous statements made by State Farm during the pendency of the original state declaratory judgment proceedings, the undisputed and uncontroverted evidence established that the Liggetts' libel claim was barred by the applicable Kansas statute of limitations. With respect to allegedly libelous statements made by State Farm in pleadings filed in the instant case, the undisputed and uncontroverted evidence established that under Kansas law State Farm enjoyed absolute immunity.

(3) *Malicious Civil Prosecution.*

That the Liggetts could not, as a matter of law, satisfy an essential element of their purported claim for malicious civil prosecution, i.e. that State Farm lacked probable cause to file or continue its declaratory judgment action against the Liggetts.[3]

With respect to the Liggetts' claim for alleged violation of their Fifth Amendment constitutional rights, Chief Judge O'Connor held that the Fifth Amendment in no way proscribed State Farm's right under Kansas law to bring an action for declaratory judgment against its own insured seeking a declaration of non-coverage, even if the alleged basis of non-coverage arises out of conduct that could also be characterized as criminal. Accordingly, because the Liggetts could not establish a violation of the Fifth Amendment or any other constitutional provision, Judge O'Connor granted summary judgment in favor of State Farm on that claim.

On August 25, 1987, the United States Court of Appeals for the Tenth Circuit (per curiam) entered its Order and Judgment affirming the district court's entry of summary judgment in favor of State Farm and against the Liggetts. (Juris. Stmt. at B-1 through B-3.) In the appeal now filed with this Court the Liggetts challenge the "decisions of Chief Judge O'Connor and the United States Court of Appeals. . ." (Juris. Stmt. at 29.)

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3. The Liggetts asserted that no matter how strong the facts are, an insurance company, as a matter of law, could *never* have probable cause to bring a declaratory judgment action against its insured, even if the insured admittedly committed a criminal act that voids the insurance policy. Chief Judge O'Connor properly concluded that this proposition by the Liggetts was absurd. (Juris. Stmt. at A-33.)

ARGUMENT

1. This Appeal Is Not Within This Court's Appellate Jurisdiction.

Article III, §2 of the Constitution declares the appellate jurisdiction of this Court shall be subject to "such exceptions" and be exercised under "such regulations" as the Congress may prescribe. This provision was considered in *The Francis Wright*, 105 U.S. 381 (1882), and the views there expressed are particularly apposite here. There the Court said (105 U.S. at 385):

> . . . the rule, which has always been acted on since [*Wiscart v. D'Auchy*, 3 U.S. 321 (1796), is] that while the appellate power of this court under the Constitution extends to all cases within the judicial power of the United States, actual jurisdiction under the power is confined within such limits as Congress sees fit to prescribe.

As was said by Justice Moody in *St. Louis, I.M., & S. Ry. Co. v. Taylor*, 210 U.S. 281 (1908): "Congress has regulated and limited the appellate jurisdiction of this court . . . by . . . the Revised Statutes, and our jurisdiction . . . extends only to the cases there enumerated, even though a wider jurisdiction might be permitted by the constitutional grant of power." *Id.* at 292. By statute the Congress has limited to two specific instances a party's right to appeal to this Court from a decision of the United States Court of Appeals. The first instance is where the United States Court of Appeals has held an act of Congress unconstitutional in a case to which the United States is a party. 28 U.S.C. §1252. The second instance is where the United States Court of Appeals

has held a state statute to be repugnant to the Constitution, laws, or treaties of the United States. 28 U.S.C. §1254(2).

The case at bar is within neither of these instances from which an appeal may be taken to this Court. Indeed, the Liggetts do not even attempt to refer this Court to any statutory provision which they believe would confer jurisdiction of this appeal on this Court.[4] This appeal by the Liggetts should, therefore, be dismissed for lack of appellate jurisdiction. *Cf. United States v. Belt,* 319 U.S. 521 (1943).

2. It Is Manifest That the Questions on Which the Decision of This Cause Depends Are So Unsubstantial As Not to Need Further Argument.

Although the Liggetts list what purport to be twenty-eight "questions presented by this appeal", the fundamental and controlling question presented by the Liggetts on this appeal (and in the district court and court of appeals below) is whether the Bill of Rights to the United States Constitution, and specifically the Fifth Amendment, prohibits an insurance company from bringing a declaratory judgment action against its own insured seeking a declaration of non-coverage on the basis that the insured deliberately and intentionally destroyed the insured property, which act would also constitute a criminal offense under state law. This has been the Liggetts' position in their pleadings in the district court below as

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4. Supreme Court Rule 15.1(e)(iii) provides that the "jurisdictional statement . . . shall contain [a] * * * concise statement of the grounds on which the jurisdiction of this Court is invoked, showing * * * [t]he statutory provision believed to confer jurisdiction of the appeal on this Court, and, if deemed necessary, the cases believed to sustain jurisdiction."

well as in their opposition to State Farm's motions for summary judgment. Chief Judge O'Connor properly held that the Liggetts' arguments in this regard were completely erroneous and frivolous and that "the Liggetts cannot, as a matter of law, prevail on their fifth amendment claim." (Juris. Stmt. at A-19.)

It is well-settled that the Fifth Amendment restricts only the federal government, not private persons or corporations. *Public Utilities Commission of the District of Columbia v. Pollak,* 343 U.S. 451, 461 (1952). Of course, State Farm is a private corporation and in no way can be considered part of the federal or state government.

The Fifth Amendment mandates grand jury proceedings only for the institution of *federal* criminal prosecution for capital or other infamous crimes. *Branzburg v. Hayes,* 408 U.S. 665, 687 (1972). Furthermore, this Court in *Hurtado v. California,* 110 U.S. 516, 538 (1884) held that the due process clause of the Fourteenth Amendment does not guarantee state criminal defendants the right to indictment by grand jury.

At the heart of this appeal now prosecuted by the Liggetts is their contention that the prior declaratory judgment action of *State Farm v. Liggett* filed in the District Court of Barton County, Kansas, was a state criminal case, a criminal prosecution by State Farm charging the Liggetts with the crime of arson and that by bringing the prior action State Farm sought ". . . to develop the example around which it would change the way corporate business relates judicially to the individual citizen." (Juris. Stmt. at 27.) These contentions are frivolous.

The prior suit was filed by State Farm pursuant to the Kansas Code of Civil Procedure, K.S.A. 60-1701, et seq.

In K.S.A. 60-1701 the Kansas legislature granted to courts of record within the State of Kansas jurisdiction and power to make binding adjudications of right "in cases of actual controversy * * * involving the validity or interpretation of . . . instruments of writing. . ." The Kansas courts have interpreted this statute broadly, and it is beyond question that an insurance company has the right under Kansas law to bring a declaratory judgment action against its own insured seeking a declaration of non-coverage. *See, e.g., Central Security Mutual Insurance Co. v. DePinto,* 235 Kan. 331, 681 P.2d 15 (1984); *Western Casualty & Surety Co. v. Budig,* 213 Kan. 517, 516 P.2d 939 (1973); *accord Aetna Life Insurance Co. of Hartford, Connecticut v. Haworth,* 300 U.S. 227 (1937) (holding that an insurance company had the right under the Federal Declaratory Judgment Act [28 U.S.C. §2201] to bring a declaratory judgment action against its own insured). Moreover, the Kansas courts have permitted an insurance company to bring a declaratory judgment action against its insured, seeking a declaration of non-coverage based on conduct of the insured which could be characterized as "criminal". *See, e.g., Patrons Mutual Insurance Association v. Harmon,* 240 Kan. 707, 732 P.2d 741 (1987) (insured alleged to have intentionally shot and killed third party with a pistol); *American States Insurance Company v. Ehrlich,* 237 Kan. 449, 701 P.2d 676 (1985) (insured alleged to have perpetrated fraud); *Casualty Reciprocal Exchange v. Thomas,* 7 Kan.App.2d 718, 647 P.2d 1361 (1982) (insured alleged to have intentionally shot third party with a gun). Indeed, cases from other jurisdictions have recognized the right of an insurance company to bring an action for declaratory judgment against its own insured contending that the insured had set or caused to be set the fire which destroyed the insured building. *Re-*

public Insurance Company v. Jernigan, 719 P.2d 331 (Colo.App. 1985); *Mountain West Farm Bureau Mutual Insurance Company v. Girton,* 697 P.2d 1362 (Mont. 1985); *Westchester Fire Insurance Company v. Deuso,* 505 A.2d 666 (Vt. 1985); *Insurance Company of North America v. Musa,* 785 F.2d 370 (1st Cir. 1986); *American Universal Insurance Company v. Falzone,* 644 F.2d 65 (1st Cir. 1981); *Continental Casualty Company v. Howard,* 775 F.2d 876 (7th Cir. 1985), *cert. denied* 475 U.S. 1122 (1986); *Miele v. Boston Insurance Company,* 288 F.2d 178 (8th Cir. 1961); *Safeco Insurance Company of America v. Kartsone,* 510 F.Supp. 856 (C.D.Cal. 1981); *Unigard Mutual Insurance Company v. Bluemel,* 485 F.Supp. 668 (D.Wyo. 1979).

Finally, the Liggetts contend that it was illegal, improper and unconstitutional for State Farm to have brought the declaratory judgment action in Barton County, Kansas, thereby depriving them of their right to sue in federal court on the basis of diversity of citizenship. Of course, the Liggetts resided in Barton County, Kansas, and the Liggetts' claim accrued in Barton County, Kansas. Under these circumstances, State Farm's declaratory judgment was properly venued only in Barton County, Kansas, where the suit was, in fact, brought. K.S.A. 60-603; *see Alliance Life Insurance Company v. Ulysses Volunteer Fireman's Relief Association,* 215 Kan. 937, 529 P.2d 171 (1974).

The declaratory judgment action brought by State Farm against the Liggetts in the District Court of Barton County, Kansas was a civil and not a criminal action. As such, the Fifth Amendment provision requiring a grand jury indictment prior to federal criminal prosecution for a capital or other infamous crime is totally inapplicable. The Liggetts having failed to establish any constitutional

basis for their claimed rights, it is evident that the questions presented by this cause are so unsubstantial as not to need further argument.

CONCLUSION

In view of the above and foregoing arguments and authorities cited in support thereof, appellee respectfully moves this Court to dismiss this appeal or, in the alternative, to affirm the Order and Judgment of the United States Court of Appeals for the Tenth Circuit.

Respectfully submitted,

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APPENDIX

U.S. Constitution, Article III, §2. Jurisdiction.

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; —to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under the Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

* * *

U.S. Constitution, Amendment V. Capital crimes; double jeopardy; self-incrimination; due process; just compensation for property.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

28 U.S.C. §1252. Direct appeals from decisions invalidating Acts of Congress.

Any party may appeal to the Supreme Court from an interlocutory or final judgment, decree or order of any court of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam and the ~~D~~District Court of the Virgin Islands and any court of record of Puerto Rico, holding an Act of Congress unconstitutional in any civil action, suit, or proceeding to which the United States or any of its agencies, or any officer or employee thereof, as such officer or employee, is a party.

* * *

28 U.S.C. §1254(2). Courts of appeals; certiorari; appeal; certified questions.

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

* * *

(2) By appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States, but such appeal shall preclude review by writ of certiorari at the instance of such appellant, and the review on appeal shall be restricted to the Federal questions presented;

* * *

28 U.S.C. §2201. [Declaratory Judgments] Creation of remedy.

(a) In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1954 or a proceeding under section 505 or 1146 of title 11, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

* * *

Kansas Statutes Annotated, §60-603. Actions against residents.

An action against a resident of this state, other than an action for which venue is otherwise specifically prescribed by law may be brought in the county,

(1) in which the defendant resides, or

* * *

(3) in which the cause of action arose, or

* * *

Kansas Statutes Annotated, §60-1701. [Declaratory Judgments] Jurisdiction; generally.

In cases of actual controversy, courts of record within the scope of their respective jurisdictions shall have power to make binding adjudications of right, whether or not consequential relief is, or at the time could be, claimed, and no action or proceedings shall be open to objection on the ground that a judgment or order merely declaratory of right is the only relief requested. Controversies involving the validity or interpretation of deeds, wills, or other instruments of writing, express trusts, statutes, municipal ordinances, and other governmental regulations, may be so determined, and this enumeration does not exclude other instances of actual antagonistic assertion and denial of right.